CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1874

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

JOSEPH MEEHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT

DAVID A. MILLS
Mills & Teague
75 Federal Street
Boston, Massachusetts 02110
617-482-4501

WALTER J. HURLEY
22 Beacon Street
Boston, Massachusetts 02108
617-742-2420

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1874

COMMONWEALTH OF MASSACHUSETTS

Petitioner,

v.

JOSEPH MEEHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT.

OPINION BELOW, STATEMENT OF JURISDICTION, CONSTITUTIONAL PROVISIONS . . .

The Respondent is satisfied with the presentation in the Brief of the Petitioner as to the matters specified in Subsections (a), (b), and (c) of Subsection 1 of Rule 40.

QUESTIONS PRESENTED FOR REVIEW

I. Whether or not the lower court was correct in affirming a trial judge's determination that a confession was involuntary in the totality of the circumstances in this case.

II. Whether or not the lower court acted properly in affirming the trial judge's exclusion of certain real evidence that was seized pursuant to a search warrant which rested upon the involuntary confession.

III. Whether or not an inculpatory admission, corroborative of the initial confession, was properly suppressed where it appears that there are no insulating factors between the two statements.

STATEMENT OF THE CASE

PRIOR PROCEDURE

Respondent Joseph Meehan was by indictment charged with first-degree murder on August 11, 1976 (A. 1, 11). Meehan filed, prior to his trial, a motion to suppress certain tangible evidence and certain statements purportedly made by him while in the custody of detectives on June 11, 1976 (A. 4, 12-15). Two affidavits were submitted to the trial court at the time of the filing of the motion to suppress (as required by local practice, Massachusetts Superior Court Rule 61) (A. 13-15). In addition, a "Motion To Amend Existing Motion To Suppress" was filed by leave of Court, during the hearing on the defendant's motion (A. 6, 15-16). The hearing commenced on May 16, 1977, and continued for seven trial days. The motion was taken under advisement by the trial judge on June 1, 1977 (A. 5-6).

On August 8, 1977, the trial court filed a "Memorandum of Decision" with reference to the Motion to Suppress, granting the motion in part, and denying the motion in part (A. 6, 43-60). Thereafter, in accordance with an available Massachusetts practice, the Commonwealth made application for interlocutory appeal [Massachusetts General Laws, Chapter 278 §28E] and the defendant made cross application for interlocutory appeal under the same statute (A. 7). On September 28, 1977, a Single Justice of the Massachusetts Supreme Judicial Court, after hearing, reported the cross applications to the full bench of the Court for hearing (A. 61). On March 19, 1979, after the issues had been briefed and argued, that Court reversed the order of the trial judge insofar as it denied the defendant's motion to suppress as to one inculpatory admission and, in all other respects, affirmed the order of the trial judge. The case was remanded to the trial court for further proceedings consistent with its opinion. (A. 61-62).

STATEMENT OF THE FACTS

On Friday, June 11, 1976, at about 6:30 in the morning, Boston Police found the body of a young lady on a lawn in the Hyde Park section of Boston (A. 43, 63). There was some blood near the decedent's head and a large rock was found near the body (A. 43, 63).

Following the discovery of the body, the police immediately initiated an investigation and interviewed a number of people who lived in the neighborhood (A. 44, 63-64). Police also began to interview and question individuals believed to have been in the area of Cleary Square on the evening of June 10 and the early-morning hours of June 11, 1976 (A. 44, 63).[1]

Witness (and neighbor) Wilde told police that she was awakened on the morning of June 11 at about 2:00 or 2:30 by the

---

[1]Cleary Square is not fully described in the record. However, the lower court notes that it is "nearby" to 40 Oak Street, the area where the decedent was found, and Cleary Square is further described by the lower court as "a familiar gathering place." (A. 63)

sound of a barking dog, then went to the window and heard a tapping noise (A. 45, 63). While at the window she said she saw a white male, in his mid-twenties, walking by her house (A. 45, 63). The man was about five feet ten, of medium-slender build, and about 150 pounds, having dark hair and wearing faded jeans and what appeared to be a long-sleeved shirt with the sleeves rolled up (A. 45, 63). Wilde did not see the face of the man (A. 45, 64).

From the interviews of other neighbors (Crowley, Giardini, Stella and McCarthy), police learned that there were some sounds at slightly after 2:00 in the morning in the area where the decedent had been later found (A. 44-45).

While some police officers were conducting these interviews of neighbors, other police investigators were interviewing, and attempting to locate for questioning, individuals who had been in the Cleary Square area on the evening of June 19, 1976 (A. 45, 64-65). Ventola and Caroll were two such witnesses.

Witness Ventola told police that he knew the decedent and had seen her in the company of a young white male, around midnight, on the evening of June 10, 1976, sitting on the steps of a church (A. 46, 64). He described the white male as seventeen or eighteen years old and that the male was not wearing a shirt (A. 46, 64).

Witness Carroll claimed that he had seen Joseph Meehan sitting on some church steps with the decedent between 11:30 and 12:00, midnight, on the evening of June 10, 1976 (A. 46, 64). Carroll (who had been brought from his home by a police officer to the station) informed police (Detective Solari) that Joseph Meehan was 18 or 19 years old, five feet, six inches, about 130 pounds (A. 46, 64). He said Meehan had dark hair, and was wearing sneakers and a print shirt with long sleeves that were rolled up (A. 64). As the questioning of Carroll was in progress, Carroll remarked that he could then see Joseph Meehan through the station house window, "thumbing" a ride on the street outside the police station (A. 46, 64-65). Solari immediately left the police

station by jumping out of a window in the detectives' room.[2]

In the meanwhile, and at Solari's directive, Officer Cannon and Detective Russo left the police building by the front door (A. 46). Solari alerted Cannon to alert other police officers (I Tr. 120). Cannon got into an unmarked police car in front of the station, made a "U turn" on the street, and, with Detective Solari in the car, proceeded up Hyde Park Avenue, pursuing Meehan (A. 46, 64). The car was used because if Meehan were successful in hitching a ride the officers intended to follow the car (A. 46, 64). Officer Russo followed Meehan up the sidewalk (A. 64).

Officers Solari and Cannon then pulled up alongside Joseph Meehan in the police cruiser (A. 47, 64). Cannon spoke to Meehan while Russo came up behind him (A. 47, 64). Cannon told Meehan that the police were investigating an *assault* and that the police were questioning all the young men known to have been in the neighborhood on the previous evening (A. 47, 64). During this confrontation, Meehan indicated to the police that he was on his way to keep an appointment at the unemployment office (A. 47, 64). Nevertheless, the three police officers took Meehan back to the station for further interrogation (A. 47, 64-65; I Tr. 127).[3]

Once at the police station, Detective Solari sat down facing Meehan (also sitting) to continue to question him (A. 47, 65). And while about one and a half feet away, the detective observed rust-colored stains on the defendant's sneakers (A. 47, 65). When Meehan was asked about the stain he responded that it might be mud from the pond where he had been swimming the previous

---

[2]The trial court apparently found that Solari " . . . immediately left the . . . building by way of a window . . . . " (A. 46). A police officer testified that Solari "jumped out the window." (I Tr. 79). The trial judge, during the hearing on the motion to suppress, didn't "make any great point of whether he jumped or what he [Solari] did." I Tr. 80. Beneath the window, five feet below, was a cement sidewalk (I Tr. 117).

[3]Solari testified that Detective Cannon opened the door and *ordered* Meehan to come to the station. (I Tr. 141).

afternoon (A. 48, 65). Detective Solari suspected that the stain was blood and engaged Meehan in conversation to establish that it was, in fact, blood (A. 48, 65; I Tr. 129).

Detective Solari asked for the sneakers; Meehan complied, taking off the sneakers[4] and handing them over to the officer. At no time did Solari inform Meehan that he did not have to give him the sneakers (A. 69; I Tr. 130). The detective carried the sneakers to the police chemist for chemical examination and analysis and tests revealed that the stain was blood, although there is no indication in the record as to the time of the test, the date seems to be the same date that the sneakers were taken from Meehan (A. 65, V Tr. 605).

Sergeant Joseph Kelley, who had assumed that Meehan had been arrested on Hyde Park Avenue (I Tr. 77), read the *Miranda* rights to him and, in the presence of three other officers, initiated an interrogation which resulted in an inculpatory admission by the defendant to the police. The trial judge determined that the warnings were made "hurriedly and in the form of rote," indicative only of their being recited and heard (A. 51-52).[5] At no

---

[4]There appears to be ambiguity in the record as to whether the sneaker is one, or both, sneakers. However, the Respondent suggests that the distinction, for purposes of the issues on certiorari, is *de minimus*.

[5]The trial judge, specifically found and ruled, *inter alia:*

> * * * The defendant's one-word responses to each of the said warnings were *recited* to Meehan and he *apparently* heard them. warnings were *recited* to Meehan and he *appareinly* heard them. I do not consider that this procedure, when it appears to have been done hurriedly and in the form of rote, is all that is required to consitute a waiver of these very vital rights of a defendant.* * * Such a rote reading of the 'Miranda card rights' makes what appears to be the ultimate line of protection of an individual involved in the most serious problem of his life almost a mere platitude and the reducing of the giving of the Miranda warnings to a mere ritual.* * * (A. 51-52)

The Respondent notes that the trial judge had before him the same transcript of the "confession" as is reproduced in the Appendix (A. 22-42). Also, the actual tape recordings of eight witness interviews, including the Respondent's "confession," were heard by the trial judge while he examined the transcripts. V Tr. 730, et seq.

time was the defendant told he could make a telephone call to his mother or anyone else.[6] He was not provided with an opportunity to seek advice or counsel (A. 26, 57, 76, 77).

With information, then, from the defendant's confession, the police later obtained a warrant to get possession of a pair of pants from the defendant's home (A. 77).[7] The pants were found and seized in the house where Meehan said they would be hanging when he made his statement (A. 59, 77-78).

In the afternoon of June 11, 1976, at about 3:45, when Joseph Meehan's mother and brother came to visit him at the District 5 station, they were first brought to the detectives' room where they were told about the alleged incident (A. 79; IV Tr. 485, 494). They

---

[6]Massachusetts law with respect to the use of a telephone by a defendant in custody is unequivocal. A statute provides:

> The police official in charge of the station or other place of detention having a telephone wherein *a person* is *held in custody,* shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the arrested person *to communicate* with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. Any such person shall be informed *forthwith* upon his arrival at such station or place of detention, of his right to so use the telephone, and such use shall be permitted within one hour thereafter. [Italics added.]

Mass. Gen. Laws, Ch. 276 §33A. And, the Massachusetts Court has ruled seriously upon this right established by statute. *Commonwealth v. Alicea,* 1978 Mass. Adv. Sh.2707,2711 n.11. See also, *Commonwealth v. Bouchard,* 347 Mass. 412 (1964); *Commonwealth v. Jones,* 362 Mass. 497 (1972).

[7]The affidavit in this case is reprinted in the Apendix at 17-19. The affiant recites, *inter alia,*

> . . . Joseph D. Meehan stated to the investigating officers that he did in fact kill Mary Ann Birks and the pants that he was wearing at the time of the incident are now located at his home . . . .

The lower court ruled that the petitioner, below, had proceeded upon the assumption that the warrant rests on the confession (A. 77). The Respondent makes the same assumption upon the matter before this Court.

were also told that Joseph had made a confession (A. 79; IV Tr. 485, 494). Sergeant Feeney and at least one other police officer accompanied the mother and brother to the cell and Feeney claimed that while in their presence he overheard a remark by Meehan: "Ma, I didn't mean to hit her so hard." (A. 58, 79). This was about three hours after the interrogation of Meehan by Sergeant Kelley (V Tr. 614).[8]

At about 5:20 p.m., on the same day, subsequent to his confession (so-called) to the police, and subsequent to his inculpatory remarks (the "three o'clock statement," so-called), and subsequent to the police taking of the sneakers and pants, Meehan spoke with an attorney, but only in the presence of a police guard (III Tr. 357, 394). At 9:00 p.m., the attorney returned and spoke with the defendant, again with the guard present and within the guard's earshot (III Tr. 399). At this very late point, Meehan's attorney first learned of the matter of drug ingestion and alcohol consumption by the defendant (III Tr. 399).

---

[8]There is abundant testimony upon the record that Meehan was not allowed to be alone with his mother, or his brother, or his attorney (when he was finally able to contact one)/(A. 57, 58, 59; see, e.g., III Tr. 357, 403, 467). An attorney testified before the trial judge in this case that he was "absolutely not" allowed to be alone with Joseph Meehan at any time on June 11, 1976, and that he requested such opportunity on three separate occasions, and was "restrained physically" from accompanying the respondent into a police cell so that he could be alone with his client. III Tr. 402, et seq.

The mother of the defendant testified before the trial judge that she was not alone when she visited her son, and that a police officer was "a couple of feet . . . two or three feet" away from her. III Tr. 467. The mother also testified that a police detective was then "three or four" feet from the cell door. III Tr. 469.

Regulations of the Boston Police Department, apparently prohibiting private communications between a suspect situated as the respondent and his attorney and family, were admitted as evidence in the case and determined by the trial judge to not have been unreasonable (Exh. 23A, V Tr. 730; A. 58).

The defendant's attorney requested a blood test, after the attorney learned, for the first time, of the ingestion by the defendant of a substantial quantity of Valium and alcohol (III Tr. 400-402). The defendant was denied the opportunity for this test, though requested by his attorney, and at his expense (A. 57, et seq.; III Tr. 400, 402). At the hearing on the motion to suppress there was considerable testimony as to the defendant's sobriety, degree of withdrawal, and physical and mental condition at the time of the defendant's arrest and interrogation.

Additional facts will be discussed in the text of the Argument, where appropriate to the context.

SUMMARY OF ARGUMENT

I. The Massachusetts Supreme Judicial Court affirmed the order of a trial judge who had suppressed a "confession" (inculpatory admissions made during a tape recorded interrogation) because it was, in his view, both involuntary, and violative of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (the trial judge had heard more than twenty witnesses, during six days of trial, with twenty-four exhibits, some with multiple parts). The respondent argues that the lower court applied proper law to the relevant facts, and was correct in excluding the confession.

(a) The lower court determined that the confession was involuntary, and the court's decision was clearly based upon findings of coercion and involuntariness;

(b) The lower court discarded the secondary basis of the trial judge's determination, i.e., a *Miranda* violation, and noted that the *Miranda* violation in the case was simply *one* of the factors in the "totality" of the circumstances;

(c) The "totality of the circumstances" test is the proper test to be utilized in determing the involuntariness of a confession, and this was the test applied by the lower court to the facts of this case;

(d) The record clearly establishes a series of

misrepresentations made by the police interrogators to the respondent; similarly, promises and inducements were made to the respondent; improper influence was exerted upon the respondent; the respondent, during the interrogation, was suffering the consequences of intoxication; the respondent was youthful and inexperienced and "completely unprepared" to deal with the deceptive tactics of the police interrogator; and, the respondent was not advised of his right to use a telephone, this in violation of an explicit Massachusetts statute.

On the basis of the totality of the circumstances, viewed in the context of the law of this Court, the lower court was proper in affirming the trial judge's exclusion of the "confession" in this case.

II. The lower court properly excluded dungaree pants from evidence where the seizure of the pants was pursuant to a search warrant that rested upon an involuntary confession. An extensive line of cases from this Court establishes that the fruits of statements obtained in violation of the Self-Incrimination Clause are inadmissible. And, although most of the cases have espoused this principle in the context of commentary upon the scope and validity of immunity statutes, the principle of law, and the language of the Court appear to be precisely on point, and current. *New Jersey* v. *Portash*, ____ U.S. ____, 99. S. Ct. 1292 (1979). Furthermore, there seems to be no inconsistency between the respondent's position in this regard and recent decisions of this Court which have refined progency of the *Miranda* case so as to allow some trial use of statements taken in technical violation of *Miranda*. In none of these recent cases has there been a claim or showing of an *involuntary* or *coerced* statement; rather, the cases involve technical violations of *Miranda*. The dungarees are the fruit of an involuntary confession and are, accordingly, directly prohibited by the Self-Incrimination Clause of the Fifth Amendment.

III. About three and one-half hours after the initial "confession" the respondent supposedly blurted out "Ma, I didn't

mean to hit her so hard." This statement was properly excluded from evidence by the lower court. The lower court determined that there were no "insulating" factors between the initial confession and the subsequent admissions, for the record discloses only that the respondent was merely kept in a cell in the meanwhile with absolutely no contact with the "outside world." As in *Darwin* v. *Connecticut*, 391 U.S. 346 (1966), there was no "break in the stream of events" to insulate the final inculpatory admission from what went on before. As in *Brown* v. *Illinois*, 422 U.S. 590 (1975), the fact that the respondent had made one statement, believed by him to mean he was "railroaded . . . to be convicted. . . . (A. 38)," with his anticipation of leniency, bolstered the pressure for him to make the second statement, or at least vitiated any incentive on his part to avoid further self-incrimination. The "three o'clock statement" was properly excluded from evidence.

ARGUMENT

I.

THE SUPREME JUDICIAL COURT PROPERLY AND CAREFULLY EXCLUDED FROM EVIDENCE A CONFESSION BECAUSE IT WAS INVOLUNTARY, AS DETERMINED BY THE STATE TRIAL JUDGE.

A. The Trial Court Determined That The Confession Was Involuntary, And The Supreme Judicial Court Affirmed On That Ground.

In the proceedings below, the Massachusetts Supreme Judicial Court reviewed the decision of a trial court on the respondent's motion to suppress certain statements and tangible evidence.

The decision of the trial court was based on a hearing which lasted six trial days. At that hearing, the judge heard testimony from more than twenty witnesses, including medical experts, and the respondent himself. In addition, the judge examined twenty-four exhibits, including transcriptions of taped interviews with the respondent and certain state witnesses.[9] The judge also listened to the recorded interviews themselves.

On the basis of this evidence, the trial judge ruled that the respondent's "confession" must be suppressed, as follows:

> 30. I, therefore, have found by way of conclusion that the entire statement taken by Sergeant Kelley . . . should be stricken on the grounds that it was neither voluntary nor was it carried out with the principles of the Miranda case in mind (A. 57).

On interlocutory review, the Supreme Judicial Court noted the dual foundation for the trial judge's judgment. That court, however, expressly focused its own decision and affirmance on a single ground, i.e., that the confession was involuntary:

> Referring to the factors of the defendant's youth, inexperience, and psychological condition induced by his drug and alcohol intake, the trial judge doubted seriously the effectiveness of the waiver of *Miranda* rights, but in his apparent view (*which we share*) the decision is better rested on *those and other factors which in combination rendered the confession involuntary* (A. 72, n.4). [Emphasis added.]

Likewise, in affirming the trial judge's determination that the dungarees must be suppressed as derivative of the involuntary confession, the lower court expressly maintained its reliance on involuntariness as the basis of its decision:

> There are cases in the Supreme Court suggesting that . . . evidence secured . . . by a violation of the prophylactic *Miranda* rule need not be excluded on any constitutional ground. [Citations omitted.] Those cases, however, do not reach the present, where the confession is *involuntary*. This distinction has been noted by the [Supreme] Court (A. 78). [Emphasis added.][10]

Finally, after a full review of the trial judge's decision with respect to the confession, the lower court concluded as follows: "We should not interfere with the judge's conclusion that the confession was *involuntary* and inadmissible." (A. 77). [Emphasis added.]

---

[9]Three of the several exhibits are reprinted in the Appendix (A. 17, 20, 22); the actual tape recording of the defendant's "confession" was an exhibit before the state trial court and the lower court (and was apparently listened to by the lower court in making its determination) (A. 76); Exhibit 14 is the transcription which was made by the police of the taped interview and made a part of the record in the trial court and lower court (A. 22-43). The lower court explicitly stated its standard in reviewing the determination by the trial judge:

> . . . that there is a presumption against waiver of constitutional rights, and, with regard to the attitude owed by the reviewing court to the trial judge who rules on a motion to suppress, that it is for the judge to resolve questions of credibility; that his subsidiary findings are to be respected if supported by the evidence; that his findings of ultimate fact deriving from the subsidiary findings are open to reexamination by this court, as are his conclusions of law, but even so, that his conclusion as to waiver is entitled to substantial deference. [Citing] *Commonwealth v. Doyle*, ____ Mass. ____, n.6, 385 N.E. 2d 503 n.6 (1979).

[10]Elsewhere throughout its opinion, the lower court makes the ground of its decision clear. See, for example, the following statement:

> [T]he confession was involuntary and thus directly offensive to the Fifth Amendment (A. 77).

The peitioner points to the lower court's single citation of *Miranda v. Arizona* (Brief of Petitioner, p. 16; A. 72) and argues that this casts doubt, or ambiguity, as to the basis of the entire opinion. Respondent suggests that this is not the case. The lower court, in its citation, uses the introductory signal "see" (A. 72). The citation to *Miranda* apparently seeks to explain the legal basis of one of the *trial* court's "findings"; the lower court expressly disapproves of the trial court's *Miranda* finding, and expressly adopts the finding of involuntariness (A. 72); and there appears no other mention (other than in footnote 4) much less reliance upon, any violation of the defendant's *Miranda* rights anywhere in the lower court's opinion.

The respondent therefore suggests that there is no ambiguity as to the ground of the Supreme Judicial Court's decision. The trial court held the confession to be involuntary and the Supreme Judicial Court affirmed the exclusion on that basis.

B. The Lower Court Applied The Correct Voluntariness Criteria By Examining The Totality Of The Circumstances Surrounding The Confession.

In concluding that the confession was involuntary, the lower court examined, *inter alia*, the following factors:

—the circumstances of the respondent's initial detention and arrest;
—the nature and extent of the police interrogator's misrepresentation of facts;
—the implicit threats made during the interrogation;
—the nature and extent of promises, inducements, and improper influence by the interrogators;
—the respondent's youth, worldly inexperience, and impaired psychological and physical condition;
—the failure of the police to advise him of his right to use the telephone to contact family, friends or a lawyer; and,
—other circumstances of detention, including those after the taking of the confession.

The general standard for reviewing the admissibility of confessions has been developed in a long line of decisions by this Court.[11] Under that standard, a confession is only admissible if

[11]It appears that this Court's first decision dealing with the admissibility of confessions was *Hopt v. Utah*, 110 U.S. 574 (1884), in which the Court appeared to apply the common law test of reliability in assessing the admissibility of the confession. It appears that this Court first applied the Fifth Amendment to the question of coerced confessions, in *federal cases*, in *Bram v. United States*, 168 U.S. 532 (1897). It appears that this Court first applied the Due Process Clause of the Fourteenth Amendment to confessions, in *state cases*, in *Brown v. Mississippi*, 297 U.S. 278 (1936). The Fifth Amendment appears to first have been applied directly to the states through the Due Process Clause of the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1 (1964).

There appear to be at least 100 other significant confession cases in the history of this Court. Reference is made to *Miranda v. Arizona*, 384 U.S. 436 (1966), *Michigan v. Tucker*, 417 U.S. 453 (1974), and *Mincey v. Arizona*, 437 U.S. 385 (1978), for any further historical background, as it appears that those cases adequately review the development and state of the law.

it was voluntary in the "totality of the circumstances." *Fikes* v. *Alabama*, 352 U.S. 191, 197 (1957); *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973). See *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978).[12]

Simply defined, voluntariness means the accused's "free choice to admit, to deny, or to refuse to answer." *Malloy* v. *Hogan*, 378 1, 7 (1964), citing *Lisbena* v. *California*, 314 U.S. 219, 241 (1941). And the totality of the circumstances means "*all* the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth* v. *Bustamonte, supra*, 412 U.S. at 226 [Emphasis added.] See *Fikes* v. *Alabama, supra*, 352 U.S. at 197. Significantly, this Court has noted that none of its cases dealing with coerced confessions "turned on the presence or absence of a single controlling factor; [rather,] each reflected a careful scrutiny of all the surrounding circumstances." *Id.* Further, the circumstances to be considered include not only events which precede the confession, but also events which occur after the confession is made. See *Haynes* v. *Washington, supra*, 373 U.S. at 514; *Spano* v. *New York*, 360 U.S. 315, 319-20, 322 (1959).

[12]The standard of review applied by this Court in examining state determinations of voluntariness may be summarized as follows: "[A]ll those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this Court." *Watts v. Indiana*, 338 U.S. 49, 50 (1949). This is because "the trial judge [is] closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony." *Mincey v. Arizona*, supra, 437 U.S. at 408 (Rehnquist, J., concurring in part and dissenting in part). It is, of course, the duty of this Court "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis v. North Carolina*, 384 U.S. 737, 741 (1966). However, without restraint, the reapplication of the totality test on review may amount to "no more than a substitution of [the Court's] view on a close factual question for that of the State courts." *Darwin v. Connecticut*, 391 U.S. 346, 350 (1968) (Harlan, J., concurring in part and dissenting in part).

The controlling test, as stated by this Court in the line of cases most closely in point, is as follows:

> If an individual's . . . confession was not *'the product of a rational intellect and a free will,'* his confession is inadmissible because coerced. *Townsend* v. *Sain*, 372 U.S. 293, 307 (1963) [emphasis added] citing *Blackburn* v. *Alabama*, 361 U.S. 199, 208 (1960).[13]

Stated another way:

> Is the confession the product of an essentially free and unconstrained choice by its maker. If it is, *if he has willed* to confess, it may be used against him. If it is not, if . . . his capacity for self-determination [has been] critically impaired, the use of his confession offends due process. *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961) [Emphasis added], cited in *Lego* v. *Twomey*, 404 U.S. 447, (1972); *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 225-26.

C. The Totality Of The Circumstances In The Instant Case Amply Supports The Lower Court's Determination of Involuntariness.

The lower court made a careful and detailed examination of all the circumstances surrounding the confession. The Court began its review by examining the circumstances of the respondent's initial confrontation with the police (A. 67-68). Although the court determined that no arrest occurred until the accused was brought into the police station (A. 68), the court noted: (1) that the officers apprehended the accused on the street; (2) the officers *did not* inform him that he was free to go; and (3) the defendant was *alone* (there were three officers), was of slight build (5 foot, 6 inches, 135 pounds), and 18 years of age (A. 64-65, 67). The respondent suggests that these circumstances are clearly a part of the totality, and were properly considered by the lower court on the issue of the voluntariness of the confession, despite that

[13]See, also, *Mincey v. Arizona, supra,* relying, *inter alia,* upon both *Townsend v. Sain, supra,* and *Blackburn v. Alabama, supra.*

court's determination that there was no arrest at that time (A. 68, n. 3).[14]

The lower court then reviewed thoroughly the circumstances of the confession, beginning with an examination of the confession's content (A. 70-72). The court noted that Sergeant Kelley, an experienced interrogator, started by informing the accused that the victim was dead and that the accused was under arrest (A. 22). The court then proceeded to note carefully: (1) the subjects that were discussed by Kelley (e.g., blood, identification of the defendant and condition of the victim); (2) the methodology of the questioning (e.g., changing subjects, proceeding on "two lines" at once; and (3) the overall dynamic employed by the interrogator during the questioning (A. 23, et seq., 70-71). Further, the court specifically noted that the interrogator:

> —lied when he informed the respondent that he had been seen on the church steps by two witnesses (A. 27, 70);[15]
> —reinforced the deception by referring to the two witnesses at least seven times, and by asserting that they were both "positively sure" of the identification, reliable, and had

[14]The decision by the trial judge is dated August 5, 1977 (A. 60); the opinion of the lower court is dated March 19, 1979 (A. 62); this Court decided *Dunaway v. New York,* ___ U.S. ___, 99 S.Ct. 2248, on June 5, 1979. In *Dunaway* the defendant was "brought" to the police station under circumstances similar to those in the instant case, and made a confession, as did the respondent in the instant case. The respondent believes that it is significant that neither the trial judge nor the lower court had the advantage of the *Dunaway* decision at the time of the making of their own decisions on the question of the respondent's initial seizure or "arrest."

[15]There was only a single such witness. While it is true that witness Carroll identified the Respondent, the other witness, Ventola, later testified that he did not even know the Respondent "by name." III Tr. 373. The fact is that the "two" witnesses repeatedly cited by the police interrogator did not exist. See A. 72. Also, the lower court did not use the word "lie," but rather noted "police misconduct that cannot be termed inadvertant." (A. 80). And, more specifically, the lower court termed Kelley's statements as "deceptive" in that they mutually reinforced the alleged identification of the respondent (A. 73).

known the defendant for several years (A. 27-28, 70);
—further reinforced the deception by alleging that two other officers could confirm these identifications (A. 28, 70);[16]
—represented that "we [the police] are not holding you here on a little thread of evidence. We have a good case here." (A. 36, 70);[17]
—represented that he was "sure" that the truth would "help your defense" (A. 35, 71), and further, that "the truth is going to be a good defense in this particular case." (A. 36, 71);[18]
—though disclaiming any promises, clearly did promise that he would help the respondent with the court (A. 34-35, 71, 74);
—initiated the suggestion that the victim had provoked the incident (A. 36, 71);
—stressed the respondent's drunken condition as an extenuating factor (A. 35-37, 71);[19]

[16]Kelley said it was not incumbent on him to show these witnesses to the defendant, "but the defendant could confirm with Feeney and Madden that they talked to the witnesses." (A. 70). Both Feeney and Madden appeared to be present throughout the questioning of the respondent by Kelley (A. 22, 70, 71). The respondent suggests that their presence reinforces the coercive action of this particular misrepresentation by making the deception a joint effort, by implication, of all three police detectives.

Additionally, it appears that at least three other police officers (Madden, Feeney and Russo) were with Kelley throughout the course of the interrogation making, it is argued, the representations of Kelley, by adoption, the representations of all four police officers, still further enhancing the coercive potential of the deception.

[17]The respondent suggests that this representation is, initially, in the nature of a threat, which later becomes part of a promise, once "leniency" becomes the topic of the police questioning (A. 71).

[18]The police interrogator also misrepresented his own role in the scene, telling the respondent "We are here to help." (A. 34).

[19]As a matter of Massachusetts law, both now and at the time of the interrogation, intoxication is not a defense to crime in Massachusetts, and was clearly not even a matter for consideration in a defense of diminished mental capacity at the time of this interrogation. See *Commonwealth v. Sheehan,* 1978 Mass. Adv. Sh. 3029, 383 N.E. 2d 1115 (1978).

The lower court carefully analyzed these and other circumstances surrounding the "confession," relying in particular on six factors in affirming the trial court's finding that the confession was involuntary. Each of these factors is discussed *infra.*

1. *Misrepresentations.*

Both courts below considered the coercive effect of the interrogator's deceptions on the defendant. The trial judge, in reviewing the false statements with respect to the witnesses, noted that next "there follows several lines of ominous expressions, then a suggestion to the defendant to think it over . . . (A. 27, 54), and noted Sergeant Kelley's further assertion, "I am not trying to trap you in any shape or form" (A. 28, 54), made immediately after his seventh or eighth repetition of this falsehood.[20] Based on these and numerous other deceptions,[21] the trial judge concluded that in fact, "Sergeant Kelley succeeded, and to use his own term, in trapping the defendant . . ." into making the inculpatory statements (A. 56).

Petitioner suggests that the misrepresentation regarding the witnesses is minimal. Brief for Petitioner, at 26 n. 13. The Supreme Judicial Court, however, pointed out that the coercive impact of these statements was that they "repeatedly bracket[ed] two witnesses as having known the defendant for years and as giving direct, *mutually reinforcing* identifications." (A. 73) [Emphasis added.] The Court also went on to note that such statements, taken together with other remarks about the

[20]The interrogator made several similar disclaimers regarding his statements about the witnesses: "I don't know what to say to you, Joe. I told you all about what we had here. I told you about the witnesses . . ." (A. 34, 54); "I have told you about the witnesses. I have told you about that. I wasn't hiding anything. I came out with it." (A. 36,55).

[21]Those misrepresentations which were also in the nature of promises are discussed in the subsequent section entitled "Promises, Inducements and Improper Influence," *infra.*

"strength of the Commonwealth's 'case' served still further to give the impression that the case against the defendant was already proved." (A. 73)

The lower court concluded that although such misrepresentations would not be sufficient alone to show involuntariness, the trial judge could properly view them as "a relevant factor in considering whether the defendant's ability to make a free choice was undermined." (A. 73) Respondent suggests that the law of this Court plainly supports the lower court's position. *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969); *Spano* v. *New York*, 360 U.S. 315, 323 (1959); *Leyra* v. *Denno*, 347 U.S. 556, 559 (1954).

In *Frazier* v. *Cupp, supra*, this Court specifically held that a police officer's false statement to the defendant that his cohort had confessed was "relevant," though not itself sufficient, in the determination of involuntariness. 394 U.S. at 739. And although that confession was found voluntary in the totality of these circumstances, the defendant there was mature, with apparent worldly experience, and there was no evidence, as here, of intoxication, drug ingestion, or promises by the police.

In *Spano* v. *New York, supra*, this Court laid great emphasis on the misrepresentation by a police officer, a childhood friend of the defendant, that the defendant had "gotten him in a lot of trouble," and that the loss of his job, on defendant's account, would be "disastrous" to his family. 360 U.S. at 323. There, the confession was excluded under circumstances which included, as here, youth (25 years old), limited education (one-half year of high school), weakened condition, no prior criminal record, denial by the police of a phone call, and a false arousal of sympathy in the defendant comparable to the use of false empathy by the interrogator in the present case.

In *Leyra* v. *Denno, supra*, this Court expressed its clear disapproval of such deceptive practices, excluding a confession elicited by a police psychiatrist who was represented to a

weakened defendant as a doctor who had come to treat the defendant's headaches. 347 U.S. at 559-60. The respondent suggests that the transcript of the interrogation in that case, which is replete with misrepresentations about the role of the police ("We are trying to help you." *Id.* at 580), false promises ("We'll help you in every way possible." *Id.* at 571), false empathy ("Everybody likes you, everybody can make a mistake." *Id.* at 579) and suggestions of provocation ("You were very mad .... You were excited, you did it in a fit of anger." *Id.* at 570), bears a significant analytical similarity to the transcript in the present case.

For other cases demonstrating that misrepresentations by the police are a factor to be considered in determining the admissibility of a confession, see *Oregon* v. *Mathiason*, 429 U.S. 492, 495-96 (1977); *Procunier* v. *Atchley*, 400 U.S. 446, 448-49 (1971); *Rogers* v. *Richmond*, 365 U.S. 534, 541-42 (1961); *Miranda* v. *Arizona*, 384 U.S. 436, 448-56, 476 (1966); *Lisbena* v. *California*, 314 U.S. 219, 237 (1941).

2. *Promises, Inducements And Improper Influence.*

During the course of the questioning, the police interrogator made numerous assertions, in express terms, that a confession would "help" the respondent in the "defense" of the charge against him (A. 34-36). In addition to being false, i.e., affirmative misrepresentations of fact, it is obvious that such statements also amount to clear promises that the defendant would benefit by making a confession.[22] Further, these asser-

[22]It is important to note that promises of benefit really function as a double-edged sword in the hands of the police interrogator. That is, at least part of the "coercive nature of this tactic can be explained by the fact that it takes on the character of a threat;" and the same would appear to be true for the use of misrepresentations in this context. See White, *Police Trickery In Inducing Confessions*, 129 U.Pa.L.Rev. 581, 606 n.138 (1979).

tions become the more insidious, and the more compelling, in light of the interrogator's false statements about the role of the police in that moment ("We are here to help." A. 34); and, moreover, in light of his representations that he, personally, would take an active role in helping the respondent with the court ("What I do in cases similar to this, I inform the court and anybody effective with the court, the District Attorney or anybody else, that the defendant . . . was very cooperative." A. 34).

The petitioner suggests to this Court that "the police in this case made no promises." Brief For Petitioner, at 26. The respondent suggests that the transcript speaks for itself. Reproduced below is the lengthy "promise speech" made by Sergeant Kelley at a point *before* the respondent made any substantial inculpatory statements to the police. The transcript is continuous but is set off in block passages to illustrate the extent to which the interrogator spoke to the respondent "out of both sides of his mouth."

> Joe, from what you tell me right here now I can't promise you anything. I can't say I am going to do this or I am going to do that. I can't do that because it is not within my providence [sic], and I have no jurisdiction over anything like that.
>
> What I do in cases similar to this, I inform the court and anybody effective with the court, the District Attorney or anybody else, that the defendant, in the presence of Detective Madden, myself and Sergeant Feeney, that he was very co-operative, he told us the truth, he had a few things that weren't correct; he corrected himself on them, and he came out and he told us the whole truth. I can honestly say that he co-operated to the fullest. You realize the seriousness of it. What good it is going to do, to tell the truth, I can—the court is going to [41] be well aware of your truthfulness,
>
> but I can't say that you are going to get a break. I just can't do those things.

> I can tell you that the court, in the past experience, that the court looks upon these cases, where a guy tells the truth, a lot better than when we have to prove it the hard way, and that's all I can tell you. I will bring it to the attention of your attorney, the District Attorney, the local court judge and right up the line, for whatever develops out of it. The fact is all I can promise you is that I will tell the truth and the fact that you cooperated,
>
> but I can't promise you anything. I can't put it any fairer than that.
>
> We co-operate with the attorney. Insofar as the defense attorneys go, we give them anything that they want and we discuss it with them openly and freely. We don't hold anything back. If you wish to tell the truth of what happened, them I can say in all fairness it would probably help your defense; in fact, I am sure it would. So I hope that explains it
>
> that I cannot promise you anything now. I don't intend to kid you by saying yes. I will get you this or get you that. I just can't say that.
>
> I can bring it to the attention of everybody concerned. When I say that, I mean the District Attorney, the Judge and everyone else.
>
> That's all I can do.
>
> So if you wish to tell me about it, I will listen, and I promise you what I would do. I will say that in the past it has helped, others in the past. I have been around for a few years, and I have had a little experience along these lines.
>
> One thing, don't get the impression I am trying to con you, because I am not. What else can I say. Anything else you want to know? (A. 34-35).

The trial judge stated that the transcript of the interrogation was the "most telling" evidence before him (A. 53). After a detailed examination of the "promise speech" above, and a thorough review of the interrogator's other assertions (A.

53-55), the trial judge concluded that the confession was elicited by improper inducement.

> Sergeant Kelley indicated at different times that he was not trying to trick Meehan and he was not trying to con him, but I have come to the conclusion that the entire interrogation was very skillfully interwoven .... There were many references in the so-called statement of Meehan, as shown in the transcript, in which Sergeant Kelly was undertaking to create the appearance in the mind of Meehan that the Sergeant was a friend of his, was trying to help him, that if he admitted what he had done that it would assist him in his defense and in his case, and sprinkled throughout all these statements was the saving assertion that he couldn't promise him anything.... I have concluded that the defendant was incapable of competing with this type of assault upon his mind (A. 56-57).[23]

On review, the Supreme Judicial Court rested its own finding of promises and inducements on the certainty of benefit implied by the interrogator's statements. "What is prohibited ... is an *assurance,* express or implied, that it will aid the

[23]The petitioner takes issue with the trial judge's consideration of the facts that the interrogation was very skillful, and that the police asked leading questions, suggesting that this somehow reflects a view that all the safeguards of trial are applicable at the station house. Brief For Petitioner, at 32. Respondent's view is that this suggestion is somewhat exaggerated since it is clear to the respondent that the judge's objection was not to the skill of the interrogator, but to the content of his statements, i.e., containing misrepresentations, promises and elements of improper influence. Moreover, this Court has more than once looked to the mismatch of particular interrogators and suspects as one factor to be considered in the totality. See *Spano* v. *New York, supra,* 360 U.S. at 322:

> [The defendant] did not make a narrative statement but was subject to the leading questions of a skillful prosecutor in a question and answer session.

See also, *Watts* v. *Indiana,* 338 U.S. 49, 53 (1949) (defendant questioned by interrogator with twenty years experience as lawyer, judge and prosecutor).

defense or result in a lesser sentence."[24] (A. 74) [Emphasis added.] Thus, the interrogator first overstepped the permissible use when he told respondent that he was "sure" that a confession would "help your defense."

> The further remark that "the truth is going to be a good defense in this particular case" goes further and carries an intimation that the defendant would be *exonerated.* Especially is this thought conveyed, when in the immediate background is the idea that a crime, if it was committed, would be palliated by the victim's provocation and by the defendant's inebriated condition at the time. (A. 74) [Emphasis added.][25]

Thus, the lower court treated the interrogator's promises and inducements as another factor which may properly be considered in the totality of the circumstances. Respondent suggests that the law plainly supports the lower court's position. *Haynes* v. *Washington, supra,* 373 U.S. at 514; *Lynumn* v. *Illinois,* 372 U.S. 528, 534 (1963); *Leyra* v. *Denno, supra,* 347 U.S. at 560; *Bram* v. *United States,* 168 U.S. 532, 542-43 (1897).

In *Haynes* v. *Washington, supra,* this Court excluded a confession primarily on the ground that the police "promised" the defendant that if he "cooperated" and signed a confession, he would then be allowed to telephone his wife and an attorney.[26] 373 U.S. at 514. There, the only other ground for exclusion was the fact that the defendant had been detained for some time before the confession was made, and the defendant,

[24]Citing *Bram* v. *United States,* 168 U.S. 532 (1897), and other cases. See A.74, n.8.

[25]For a good example of another interrogator's suggestions to a susceptible defendant that the victim provoked the crime, and that his condition at that time would mitigate his responsibility, see *Leyra* v. *Denno, supra.*

[26]What the police stated to the defendant as a "promise" in this case was, of course, also a threat. See n. 22, *supra.*

notably, was neither young, nor intoxicated, nor lacking in experience with the law.[27]

In *Lynumn* v. *Illinois, supra,* the defendant's confession was excluded because of police promises of leniency if she cooperated, and threats that if she did not, her welfare benefits would be cut off, and her children taken away. Although the threats in that case were somewhat more explicit than here, it should be noted that the defendant there, like the respondent, had no prior experience with the law and, moreover, was in custody for only a short time prior to the confession.

In *Leyra* v. *Denno,* as noted *supra,* a police psychiatrist promised the defendant, in weakened condition, not only leniency but help as a friend. 347 U.S. at 559-60. In addition, as here, the interrogator improperly suggested that the defendant's condition at the time of the crime would mitigate his responsibility for those acts.

The classic statement of the prohibition against the use of promises and inducements in eliciting confessions appears in *Bram* v. *United States, supra.* In that case, an officer informed the accused that his shipmate had seen him kill the victim, and told him to name his accomplice in order that he would "not have the blame of this horrible crime on [his] shoulders." This Court ordered the confession excluded, holding that a confession, to be admissible,

> must be free and voluntary: that is, it must not be extracted by any sort of threats or violence, *nor obtained by any direct or indirect promises, however slight,* nor by the exertion of any improper influence. 168 U.S. at 542-43. [Emphasis added.]

The *Bram* doctrine is still good law. It was recently

[27]As to the facts of the defendant's background in *Haynes*, see 373 U.S. at 522 (Clark, J., dissenting).

reaffirmed by this Court in *Brady* v. *United States,* 397 U.S. 742 (1970), which dealt with the voluntariness issue in the context of a guilty plea. The Court's discussion of that case is fully applicable to the present case.

> *Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, *even a mild promise* of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but *because defendants at such times are too sensitive to inducement* and the possible impact on them too great to ignore and too difficult to assess. 397 U.S. at 754 [Emphasis added.][28]

In the present case, the trial judge found that the interrogator used promises and other inducements, implied threats and improper influence in eliciting the confession from the respondent.[29] The Supreme Judicial Court agreed, and considered these tactics as one factor in affirming the trial judge's finding of involuntariness. In view of the cases cited the respondent submits that the judgment of the lower court is clearly supported by the law of this Court.

3. *Intoxication*

The respondent testified at the hearing that he was "dazed

[28]See also *Hutto* v. *Ross,* 429 U.S. 28 (1976), holding that where a defendant gives a confession knowing that an existing plea bargain will remain available whether or not he confesses, that confession is voluntary because not "the result of 'any direct or implied promises.' " 429 U.S. at 30 citing *Bram, supra.*

[29]As evidence that the interrogator's deceptive method was purposeful, see the self-serving disclaimers of voluntariness inserted for the record (in the form of questions) at the end of the interrogation, at A.40, 42. As this Court noted in *Haynes* v. *Washington, supra,* 373 U.S. at 601, "common sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, they would have little, if any, trouble securing the self-contained concession of voluntariness." See similar disclaimer in *Davis* v. *North Carolina,* 384 U.S. 737, 751-752 (1966).

and confused" at the time he was interrogated by the police[30] (A. 76, IV Tr. 543).

The trial judge heard extensive uncontradicted evidence from several witnesses regarding the ingestion by the respondent of a substantial amount of Valium drug and alcohol during the evening of June 10 and the morning of June 11, 1976.[31] In reaching his finding, the judge also considered medical testimony about the effects of such quantities of Valium and alcohol on the defendent (A.51). The trial judge found that at the time of the interrogation, the respondent was

> riding off a night and morning Valium and beer experience, with a degree of hangover a matter of disagreement between two doctor experts, with the dimness of his sense of judgment still hanging over him .... (A. 52).

On review, the lower court noted the expert testimony (obviously believed by the trial judge) as to the impaired judgment, memory and intellectual functioning of the respondent on the night of the incident and the morning of the interrogation (A. 75-76). The court also noted in particular that interrogator Kelley was fully aware of the respondent's drug and alcohol ingestion, and of his dazed condition, at a time *before* the respondent's inculpatory admissions (A. 71).[32] The

[30]See *Leyra* v. *Denno, supra,* 347 U.S. at 560 (confession excluded where defendant was in "dazed and bewildered condition"); *Mincey* v. *Arizona, supra,* 437 U.S. at 348 (same, "confused" condition). See also *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 229 (requiring consideration of a defendant's "possibly vulnerable subjective state").

[31]See, e.g., II Tr. 246, 255-258; III Tr. 421-424, 429; III. Tr. 449-450, 452-453; IV Tr. 518-519, 534-535, 540, 562-563. See also Affidavit of Joseph D. Meehan (A.13).

[32]See A.33: ("A. I got whacked out last night .... Q. All right. You were on downers? And you were drinking beer with one of the downers? A. They were valiums .... Q. So how many did you take—roughly? A. About 15.); A.35: ("Q. ... Are you still—A. High from last night, a little jiggy."); A.36: ("Q. What did you say again? A. High on the valiums and drunk, you know, a few six packs."). See also A.41.

lower court also listened to the tape of the interrogation as part of its review (A. 76).

The lower court concluded that the trial judge properly included in the totality of the circumstances his finding that the respondent's judgment was "dim" and "impaired" at the time of the interrogation. The respondent suggests that the law of this Court plainly supports the lower court's position. *Townsend* v. *Sain, supra,* 372 U.S. at 308; *Beecher* v. *Alabama,* 408 U.S. 234, 238 (1972); *Mincey* v. *Arizona, supra,* 437 U.S. at 396. See *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 227, 229.

4. *Youth And Inexperience*

At the time of the interrogation, the respondent was 18 years old. Both the trial judge and the lower court considered the respondent to be young (A. 76).

The respondent was also inexperienced. The respondent's mother testified that he had only been away from home by himself overnight on three or four occasions. She also testified that he had virtually never been out of the several Boston neighborhoods in which they had lived (IV Tr. 481-82). In addition, the respondent had limited schooling, a "poor educational background." (A. 76-77). And there was no evidence that he had ever had any previous experience with the police or the courts.

The trial judge noted that the respondent was "completely unprepared" to deal with the deceptive tactics of the police interrogator (A. 57). The lower court held that the trial judge properly considered the defendant's youth, inexperience and limited education in the totality of the circumstances (A. 76). The respondent suggests that the law of this Court plainly supports the lower court's position. *Payne* v. *Arkansas,* 356 U.S. 560 (1958) (youth: age 19); *Townsend* v. *Sain, supra,* 372 U.S. at 308 n.4 (inexperience and youth: age 19); *Spano* v. *New York, supra,* 360 U.S. at 322 (limited education: one-half year

of high school); *Lynumn* v. *Illinois, supra,* 372 U.S. at 534 (1963) (lack of experience with criminal law). See *Fare* v. *Michael C.,*____U.S.____, 99 S. Ct. 2560 (1979).[33]

G. Failure To Advise Of Right To Use Telephone

The petitioner here concedes the fact that the respondent was not advised by the police of his right to use a telephone to communicate with family or friends. Brief For Petitioner, at 25. This action by the police was in express violation of a Massachusetts statute.

This Court has consistently condemned police action which seeks to isolate a suspect from the outside world in order to increase the pressure on the suspect to confess. See *Miranda* v. *Arizona,* 384 U.S. 436, 449-50 (1966); *Rogers* v. *Richmond, supra,* 365 U.S. at 542-43; *Spano* v. *New York, supra,* 360 U.S. at 322-23. Moreover, in *Haynes* v. *Washington, supra,* this Court excluded a confession made by a defendant who had been denied his statutory right to use the telephone, and the Court's decision was based primarily on that fact, and the police promises and threats accompanying that denial. 373 U.S. at 514.

The lower court held that the failure of the police to advise the respondent of his statutory right to use the telephone was

[33]In the *Fare* v. *Michael C.* case, this Court determined that the lower state court should have determined the issue of waiver on the basis of all the circumstances surrounding the interrogation of the respondent, rather than a limited *Miranda* basis. This Court also noted that the juvenile, 16½ years of age, had had considerable experience with the police, with a record of several arrests, having served time and been on probation several years and, additionally, being under the full-time supervision of probation at the time of the interrogation. Also in *Fare,* there is no evidence or indication of deficient intelligence or trickery or deceit, as compared with the circumstances of interrogation in the instant case.

another factor to be considered in the totality of the circumstances (A. 77). The respondent suggests that the law of this Court plainly supports the lower court's position. *Haynes* v. *Washington, supra.*

The petitioner has premised its initial argument upon the assumption that the Massachusetts court, at least in significant part, rested its decision upon the finding of a technical violation of *Miranda.* Brief of Petitioner, at 16, et seq. In view of the respondent's position that involuntariness was the sole ground of the Supreme Judicial Court's decision, the petitioner's argument with respect to *Miranda* is not addressed further.[34]

The petitioner has premised the second portion of its second argument (II,B, at 24-30) upon the assumption that the Massachusetts courts merely considered a series of *non*-coercive factors in holding the confession involuntary. As the basis for this argument, the petitioner relies solely on *Procunier* v. *Atchley, supra,* which appears to distinguish between factors which constitute "actual coercion" and factors which merely establish a "setting" in which actual coercion might be exerted. See 400 U.S. at 453-54.

Even assuming that *Procunier* is applicable and governs here, the petitioner's argument must fail. It is true that under the distinction made in *Procunier,* the passive factors considered by the lower court (i.e., the defendant's intoxication,

[34]During the course of the interrogation, but prior to the inculpatory admissions, the interrogator asked: "Is there anything else, Joe, you would like to tell us?" And the defendant Meehan's response was "No." And, nevertheless, Sergeant Kelley proceeded right along with the questioning, ignoring what had just been stated to him by the defendant (A. 54). The respondent suggests that the question, his response, and the police officer's response to the defendant's response, though insufficient as a "trigger" to the *Miranda* prophylaxis, may nonetheless be relevant criteria in determining voluntariness of his inculpatory admissions.

youth, inexperience, and the failure of the police to advise him of his right to use the telephone) would be initially relevant only to establish the background potential for police coercion. However, the decisions of this Court clearly show that misrepresentations, promises, threats and improper influence are all factors which constitute actual coercion.[35] And given such actual coercion here, *Procunier* would then apply the background factors to determine (here, to increase substantially) the coercive weight of such misrepresentations, promises, threats and improper influence.

Moreover, if *Procunier* is to be reconciled with several of the more honored decisions of this Court, it can only be construed to mean that mere interrogation will suffice to constitute actual coercion where the defendant is in weakened or vulnerable condition, as here, and the background potential for coercion is therefore great. *Townsend* v. *Sain, supra; Blackburn* v. *Alabama, supra; Mincey* v. *Arizona, supra.*

In each of the cases cited above, this Court excluded a confession as involuntary because it was not "the product of a rational will and a free intellect." *Townsend* v. *Sain, supra,* 372 U.S. at 307; *Blackburn* v. *Alabama, supra,* 36 U.S. at 208; *Mincey* v. *Arizona,* 437 U.S. at 398. However, the only undisputed evidence in these cases which could now be taken to constitute actual coercion under *Procunier* is the evidence of police questioning itself.

For example, in *Townsend* v. *Sain, supra,* the defendant was, it is true, injected by the police doctor with "truth serum." The point of this use, however, is that the officers who subsequently interrogated the defendant *were not aware* of that fact. 372 U.S. as 299. In fact, the Court expressly pointed out that the issue of coercive police misconduct in this case was "irrelevant," *Id.*, at 309, holding that

[35]See cases cited in the sections entitled "Misrepresentations" and "Promises, Inducements and Improper Influence."

> Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders the confession inadmissible. *Id.*, at 308-09 [Emphasis in original.]

Likewise, in *Blackburn* v. *Alabama, supra,* the police questioned the defendant under the assumption that he was sane, but the resulting confession was excluded because, in fact, he was not. And although there are concededly other factors present in *Blackburn* which might be taken to constitute actual coercion, the factor principally relied upon by the Court was the mere questioning of the defendant while he was in a condition in which he lacked any meaningful "volition." See 301 U.S. at 211.

Finally, as recently as last Term, this Court again reaffirmed the notion that a confession, to be admissible, must be voluntary in fact. In *Mincey* v. *Arizona, supra,* the only coercive police action was the fact that the defendant was questioned while he lay wounded in a hospital bed. Notably, the *Procunier* case is not mentioned in the Court's opinion. The Court merely notes that the defendant's statements were not the "product of a rational intellect and a free will," citing *Townsend* v. *Sain, supra,* and *Blackburn* v. *Alabama, supra,* and goes on to hold that

> *Any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law. 437 U.S. at 318.

It is therefore the respondent's position that *Procunier,* a case dealing mainly with the requirements of a federal habeas corpus petition, is somewhat of an aberration among this Court's cases on voluntariness. The essential requirement for voluntariness underlying all of the Court's other decisions in this context is the defendant's free will, and not "actual coercion." Moreover, as illustrated above, *Procunier* can only be reconciled with prior and subsequent decisions of this Court by construing the actual coercion requirement to be satisified by

interrogation alone where the defendant, as here, was in a weakened or vulnerable condition at the time of the interrogation. So construed, *Procunier* is satisfied in the present case. Moreover, as noted *supra*, it is clear that misrepresentations, promises, threats and improper influence of the sort practiced by the police interrogator in the present case would, in any event, constitute actual official coercion under *Procunier*.

Finally, the respondent would point out that despite the Court's recent emphasis on 1) the trustworthiness of the contested evidence, and 2) the deterrence of police misconduct, as criteria for deciding whether the exclusionary rule should be invoked in *other* contexts (see, e.g., *Michigan* v. *Tucker*, *supra*, dealing with a Miranda violation), these decisions have done nothing to alter the traditional criteria for determining involuntariness. In this context, it remains the law that 1) the truth or falsity of a confession is irrelevant, *Rogers* v. *Richmond*, *supra*, 365 U.S. at 540-41, see *Mincey* v. *Arizona*, *supra*, 437 U.S. at 398; and 2) with respect to deterrence,

> the constitutional inquiry is not whether the conduct of state officers. . .was shocking, but whether the confession was free and voluntary [in fact]. *Malloy* v. *Hogan*, *supra*, 378 U.S. at 7. See *Mincey* v. *Arizona*, 437 U.S. at 401.

In conclusion, the respondent submits that two lower Massachusetts courts, after painstaking analysis, have determined that the improper tactics employed by the police interrogator in this case were sufficient to deprive a vulnerable defendant of the free will necessary to make an admissible confession. In these circumstances, the respondent suggests that this Court's standards are clear. The judgment of the Massachusetts court must be affirmed on the ground that the respondent's confession was involuntary.

II.

THE STATE COURT PROPERLY EXCLUDED REAL EVIDENCE WHICH HAD BEEN SEIZED PURSUANT TO A SEARCH WARRANT THAT RESTED ON AN INVOLUNTARY CONFESSION.

The trial judge ordered suppressed certain pants ("dungarees") which the accused was allegedly wearing at the time of the incident (A. 59). The trial judge's rationale was simple:

> Inasmuch as the location of the pants was obtained as a result of the statement by the defendant to Sergeant Kelly [sic] which I have already suppressed, I rule that this warrant suffers by the same disability of illegality on that account and therefore the pants involved, as well as the underwear also obtained as a result of this warrant, are suppressed as well (A. 59).

The Massachusetts Supreme Court agreed that the warrant could not legalize the seizure of the dungarees on "the ground that the confession was involuntary and directly offensive to the Fifth Amendment." (A. 77). The lower court further noted its view that the reasons for excluding the product of a warrant based on an inadmissible confession are surely no less persuasive than those for excluding material seized in pursuance of a warrant supported by an affidavit infected by evidence that has been unlawfully seized (A. 78) [See Model Code of Pre-Arraignment Procedure, Commentary to §150.4 (1975)].

The respondent suggests that this Court has long recognized that the fruits of statements obtained in violation of the Self-Incrimination Clause are inadmissible. In *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), this Court examined the Self-Incrimination Clause in the backdrop of the local law of several states,[36] and noted:

[36]The Court explicitly noted the then state of the law in Arkansas, Georgia, California, Indiana, New York, New Hampshire, North Carolina, Massachusetts and Virginia. 142 U.S. at 584.

> It is a reasonable construction, we think, of the constitutional provision, that the witness is protected 'from being compelled to disclose the circumstance of his offence, *the sources from which*, or the *means by which, evidence of its commission, or of his connection with it, may be obtained*, or made effectual for his connection, without using his answers as direct admissions against him.' [citing] *Emery's Case*, 107 Mass. 172, 182 [1871].

142 U.S. at 585 [Emphasis added.]

In *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52 (1964), this Court held that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony *and its fruit* cannot be used *in any manner* by federal officials in connection with a criminal prosecution against him. 378 U.S. at 79.[37] In *Kastigar* v. *United States*, 406 U.S. 441 (1972), this Court noted that the Fifth Amendment privilege against compulsory self-incrimination "protects against *any* disclosures that the witness reasonably believes could be used in a criminal prosecution *or*

[37]The Court went on to state:

> We conclude, moreover, that in order to implement this constitutional rule . . . the Federal Government must be prohibited from making *any* such use of compelled testimony *and its fruit*. 378 U.S. at 79. [Emphasis added.]

could lead to other evidence that might be so used." 406 U.S. at 445.[38] [Emphasis added.]

And, in *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (in considering a New York statute that vitiated certain contract rights of persons who refused to testify before a grand jury), this Court stated:

> In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers *and evidence derived therefrom* in any subsequent criminal case in which he is a defendant. [Citation to *Kastigar* v. *United States, supra*] 414 U.S. at 78. [Emphasis added.]

And, in *United States* v. *Mandujano*, 425 U.S. 564 (1976) (in a separate opinion by Mr. Chief Justice Burger, in which Justices White, Powell and Rehnquist joined) there appears this view:

[38]In *Kastigar* the Court upheld the immunity statute against a challenge that mere use immunity is not coextensive with the Fifth Amendment's privilege:

> The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of "penalties affixed to . . . criminal acts.' " Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. 406 U.S. at 453. [Emphasis in original, footnote omitted.]

[Cited as authority in *New York* v. *Portash*, ____U.S. ____, 99 S.Ct. 1292, 1296 (1979)] See, also *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *Blau* v. *United States*, 340 U.S. 159 (1950); *Mason* v. *United States*, 244 U.S. 362, 365 (1917).

> Immunity is the Government's ultimate tool for securing testimony that otherwise would be protected; unless immunity is conferred, however, testimony may be suppressed, *along with its fruits,* if it is compelled over an appropriate claim of privilege. 425 U.S. at 576 [Citation omitted; emphasis added.]

The respondent recognizes that each of these cases has to do with one or more statutes dealing with grants of immunity, the scope of immunity, or the consequences of immunity. Nevertheless, the respondent suggests that the law of this Court is clear that immunity is the essence of coerced testimony. *New Jersey* v. *Portash,* ____ U.S. ____, 99 S.Ct. 1292 (1979). And, upon the basis of *Counselman, Murphy, Kastigar, Lefkowitz, Mandujano* and *Portash,* the respondent states that this Court has recognized that the fruits of statements obtained in violation of the Self-Incrimination Clause are inadmissible. And the respondent suggests that the dungarees in this case are clearly fruits of a compelled, involuntary statement, and that their suppression is clearly required by existing law in an uninterrupted line of cases since 1892.

The petitioner claims that the Fifth Amendment exclusionary rule has no application to the proceeding in the instant case (application for a search warrant) or the evidence involved (the respondent's dungarees) and further argues that the application process is not a *trial* and that the dungarees are not *testimonial communication.* However, the respondent suggests that the petitioner's analysis appears to ignore the line of cases that commenced with *Counselman, supra;* the derivative evidence in these cases (the "fruits") is not restricted, even by implication, to exclude real or physical evidence. Additionally, the respondent does not object to the use of the compelled testimony in the application process for the search warrant, but, rather, the use of the "fruits" of his compelled statement at his eventual trial.

Schmerber v. *California,* 384 U.S. 757 (1966) and *Gilbert* v. *California,* 388 U.S. 263 (1967), do not support a contrary position. *Schmerber* is a case about a blood sample; *Gilbert* is a case about a handwriting examplar. Each is a case about a *physical characteristic,* having nothing to do with compelled *communication.* Neither of the cases are communication cases, although they are cases about government compulsion.[39] In neither *Schmerber* nor *Gilbert* is there anything concerned with actual communication from the mind of the suspect any more, really, than the number of his teeth or the pattern of his thumbprint. These are cases of identification characteristics, by comparison with the instant case, which is one of a coerced and involuntary confession, the use of compelled testimony or communication.

The petitioner also argues (Brief, p. 38 et seq.), that the instant case is not one appropriate for the application of the "fruit of the poisonous tree" doctrine because (1) there is no actual compulsion in this case, and that (2) under the circumstances of this case, a balancing test is both appropriate and permissible. The respondent disagrees inasmuch as (1) there is clearly advertent police misconduct in this case (actual coercion) as has been discussed in Argument I, *supra,* and (2) there is no precedent for a balancing test in the circumstances of this case, where the initial violation is a Fifth Amendment violation, as opposed to a technical *Miranda* violation.

In *New Jersey* v. *Portash,* ____U.S.____, 99 S. Ct. 1292 (1979), this Court was asked to "balance" as had been determined appropriate in *Harris* v. *New York,* 401 U.S. 222

---

[39]And, the Court in *Gilbert* v. *California* also stated:

> The privilege reaches only compulsion of 'an accused's communications, whatever form they may take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers, ...' [citing] *Schmerber* v. *California,* 384 U.S. at 757.

388 U.S. at 266-67.

(1971) and *Oregon* v. *Hass*, 420 U.S. 714 (1975). However, the Court in *Portash* noted that *Harris* and *Hass* were cases of technical violation of the *Miranda* rule, with no *suggestion* in either case that the statements involved were involuntary or coerced. In *Portash* the Court stated:

> As we reaffirmed last Term, a defendant's compelled statement, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatsoever against him in a criminal trial. 'But *any* criminal trial use against a defendant of his involuntary statements is a denial of due process of law.'. . . [citing] *Mincey* v. *Arizona*, 437 U.S. 385. [Emphasis in original.] 99 S. Ct. at 1297.

The respondent's case is not a case of technical *Miranda* violation. The lower court did not decide the case on that basis, and, the respondent argues the issue is not before this Court. This is a case of an actually coerced confession in which the law is clear. *New Jersey* v. *Portash, supra; Mincey* v. *Arizona, supra.*[40]

[40]Recent cases of this Court further defining the law of confessions and the law of *Miranda* seem clearly distinguishable. In *Harris* v. *New York*, 401 U.S. 222 (1971) this Court explicitly noted that there was no claim made that the statements were involuntary or coerced. 401 U.S. at 224. (Additionally, *Harris* appears, in some respects, a case about the impeachment process, whereas the dungarees in the instant case have been excluded from the State's case-in-chief.) Also, respondent argues, *Harris* is a case of technical *Miranda* violation. *Michigan* v. *Tucker*, 417 U.S. 433 (1974) is similarly distinguishable. It, too, appears to be a case of technical *Miranda* deficiency (in a pre-*Miranda* questioning) where this Court noted explicitly that the record showed that the respondent's statements were not involuntary or the result of potential legal sanction. 417 U.S. at 444-45.

In *Oregon* v. *Hass, supra*, this Court noted that there was no evidence or suggestion that the statement was involuntary or coerced, and this case, too, appears to be one of *Miranda* redefinition. 420 U.S. at 722. In *United States* v. *Washington*, 431 U.S. 181 (1977) this Court noted explicitly that it was not a case where the "waiver of rights" form was involuntary and further, that it was "inconceivable" that the warning given in the case would fail to alert the defendant of his right to refuse to answer.

III.

THE LOWER COURT ACTED PROPERLY IN EXCLUDING THE "THREE O'CLOCK STATEMENT" FROM EVIDENCE

At approximately 3:45 in the afternoon, the respondent's mother and brother arrived at the police station to see the defendant. They were led to the detectives' room and were informed that the defendant had confessed the crime (A. 79). At least two police officers then accompanied the family members to the cell (A. 79). At this time the mother described the defendant as being " . . . in the cell like an animal with no shoes on . . .," (III Tr. 466) with eyes glassy and blurry, and stuttering, with slurry and incoherent speech (III Tr. 468). The brother testified that he was accompanied to the cell by *four* police officers (some in plain clothes) who refused the request, "Can I talk to Joey alone, please?" (III Tr. 495-96). The mother and brother were not allowed to be alone with the defendant (A. 57, 58, 79).

At this time the defendant appeared "really tired" and "very weak" with his face all drawn, with his eyes "drawn and bloodshot, glassy." (III Tr. 498). And, to his brother who had known him for eighteen years, the defendant appeared " . . . like he was high, that he was loaded." (III Tr. 497-98).

The record is apparently silent as to what, if anything, happened to Joseph Meehan between the time he was questioned by the police interrogators and the time that his mother and brother attempted to visit with him. All that appears is that the defendant was taken from the interrogation room and placed in a cell. He was not taken out of the police station. He was not brought for an appearance before a Magistrate. And he did not contact or consult with any friend, relative or attorney during this period (See A. 80).

Sergeant Feeney claimed that, as the mother and brother appeared, the defendant blurted out, "Ma, I didn't mean to hit her so hard." According to the defendant and his mother, he said only, "I'm sorry, Ma." (A. 79). Either statement is, it is suggested, an inculpatory statement corroborative of the confession.

The trial judge ruled the alleged statement admissible, holding that it was spontaneously made and unprompted by the police (A. 58). The lower court disagreed with the trial judge, noting a lack of factual support for the conclusion and a "misperception of the law" by the trial judge (A. 80); the lower court began with the premise that:

> . . . there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first, and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time. (A. 80) [citing] *United States* v. *Gorman*, 355 F.2d 151, 157 (2d Cir. 1965), cert. den., 384 U.S. 1024 (1966).

The lower court then recognized that no factors which might have provided the "insulation" necessary to separate the "three o'clock statement" from the effects of the initial involuntary "confession" were present. Also citing *Brown* v. *Illinois*, 422 U.S. 590, and *Darwin* v. *Connecticut*, 391 U.S. 346 (1968) (Harlan, J., concurring in part and dissenting in part) (A. 80). The lower court analyzed the circumstances, noting in particular:

> —the short span of time between the first and second statement;
> —the same place (at the same station, in police detention);
> —the corroborative nature of the second statement when compared with the first;
> —the absence of consultation by the defendant with family; and,
> —the residual effects upon the defendant of earlier police deception and misconduct (A. 80).

The lower court also explicitly evaluated the criteria that had been applied by the trial judge (the alleged spontaneity and non-prompting by the police), and further noted its view that the earlier police misconduct "cannot be termed inadvertent." (A. 80). The lower court determined that there had been no "break in time or the stream of events" sufficient to disassociate the statement from the confession (A. 80).[41]

In *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944), this Court considered a questioned confession which followed a previous confession which was given on the same day and which was, in that case, admittedly involuntary. 322 U.S. 597. At the time of the confessions in the case, this Court noted that the defendant was 21 or 22 years of age, with no indication of a sub-normal intelligence, and with a previous (but minimal) criminal record. 322 U.S. at 599. He had not been represented by counsel until a point subsequent to the confessions. 322 U.S. 599. The defendant was visited by wife and family between the time of arrest and the time of the first confession. 322 U.S. 599.[42]

This Court noted that the federal question in the case is whether the second confession was given under such circumstances that its use as evidence at the trial constitutes a violation of the due process clause of the Fourteenth Amendment. 322 U.S. at 601. And this Court held that the question of whether the later confession is itself voluntary depends on the inferences

---

[41]This evaluation by the Massachusetts court was hardly a novelty to that court. See *Commonwealth* v. *Haas*, ____ Mass. ____, 1977 Mass. Adv. Sh. 2212, 2223; *Commonwealth* v. *Mahnke*, 368 Mass. 662 (1975), cert. denied 425 U.S. 959 (1976).

[42]There appears to be contradictory evidence as to whether or not Lyons had been subjected to violence and threats of further harm unless he confessed. 322 U.S. 599. Lyons made an oral confession at one point, then a subsequent oral confession that was reduced to writing. 322 U.S. 600.

as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. 322 U.S. at 602, citing *Lisenba* v. *California,* 314 U.S. 219 (1941). The Court said, *inter alia:*

> * * * The admissibility of the later confession depends upon the same test—is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. * * * 322 U.S. 603.

This Court, in *Lyons,* then related other circumstances with respect to Lyons' second admission and noted, among other things, that Lyons had made the second confession while being under circumstances which apparently indicated no reason for him to fear mistreatment and other indicia of voluntariness including familiarity of surroundings and evidence that there was no further force of threat. 322 U.S. at 604-05.

In *United States* v. *Bayer,* 331 U.S. 532 (1947), the suspect made a first confession under circumstances of confinement where he was denied callers, communication, comforts and facilities. 331 U.S. 539. Without more, this Court assumed this first confession to be inadmissible under the rule of *McNabb* v. *United States,* 318 U.S. 332 (1942). 331 U.S. at 539-40. A second confession was made about six months later, which this Court held to be admissible, noting that detention had been all but eliminated, and that the defendant had been explicitly warned that the second statement might be used against him. 331 U.S. at 540-41. However, in the course of deciding, the Court made the following statement:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. 331 U.S. at 540.[43]

In *Leyra* v. *Denno,* 347 U.S. 556 (1954), this Court considered subsequent confessions given by the accused in rapid succession, immediately following a confession obtained through mental coercion, all within a period of about five hours, under circumstances in which the accused appeared physically and emotionally exhausted, and not protected by counsel.[44]

In the *Leyra* case, this Court noted that the questioner, time and time and time again, told the petitioner how much he wanted to and could help him. 347 U.S. at 559. The questioner also told the petitioner how much better he would feel and how much lighter and easier it would be on him "if he would just

---

[43]The Court explicitly noted that the second confession in this case was made *six months* after the first; that the only restraint under which base the defendant then labored was that he could not leave an Army base without permission. 331 U.S. at 541.

[44]The actual confession in the *Leyra* case is reprinted as an appendix to the Opinion of the Court. 347 U.S. at 562, et seq. The respondent in this case asks the Court to note the remarkable similarity in the questioner's dynamic when the *Leyra* transcript is compared to the transcript of the "confession" in this case. Particularly noteworthy is the fact that the questioner touched the suspect; that the questions were frequently leading questions; that the answers were frequently monosyllabic; that there were intermittent suggestions of reward and inducement; and that there appears an empathy by the questioner to the suspect.

unbosom himself. . . ." 347 U.S. at 560.[45]

This Court, in *Leyra,* noted that the "formal confession" taken several hours after the initial interrogation and inculpatory admissions, were "so close that one must say the facts of one control the character of the other. . . ." 347 at 561. This Court noted that all of the inculpatory admissions were simply part of one continuous process, within a period of about five hours, as the climax of the interrogation of a physically and emotionally exhausted suspect. 347 U.S. at 561.

In *Darwin* v. *Connecticut,* 391 U.S. 346 (1968), the petitioner had made multiple confessions, and the first three had been excluded by the trial judge. This Court, in excluding the fourth confession and a partial re-enactment of the crime (staged at the request of the police), noted that the petitioner had been kept incommunicado and that there was "no break in the stream of events" from arrest throughout the concededly invalid confessions . . . to the confession and reenactment . . . 'sufficient to insulate' the final events 'from the effect of all that went before.' " 391 U.S. at 349, citing, *Clewis* v. *Texas,* 386 U.S. 707 (1967), and *Beecher* v. *Alabama,* 389 U.S. 35 (1967).

[45]Yet the doctor [questioner] was at that very time the paid representative of the state whose prosecuting officials were listening in on every threat made and every promise of leniency given. 547 U.S. at 560.

It is also interesting to note that in *Leyra,* a tape recording of the interrogation was made and a transcription of the interrogation was available in the record. This Court noted, as did the trial judge in an instant case, that the petitioner's answers indicate a mind dazed and bewildered. This Court also noted, as did the trial judge in the instant case, of certain complaints made by the petitioner during the course of the interrogation. 347 at 560. Finally, this Court, in its opinion in *Leyra,* noted that the petitioner's answers were barely audible and that the record indicates that the petitioner began to accept suggestions of the interrogator. 347 U.S. at 560.

In *Brown* v. *Illinois,* 422 U.S. 590 (1975), the petitioner had been arrested under circumstances indicating that the arrest was investigatory, and made two in-custody inculpatory statements after he had been given the *Miranda* warnings. 422 U.S. at 591. As in the instant case, at the time of initial confrontation between police and suspect, the suspect was advised that he was suspected for the commission of a crime and he was escorted to a police car. 422 U.S. at 593. In both cases, the suspect was taken to a police station and interrogated. 422 U.S. 593-94. In each of the cases, the suspect was given *Miranda* warnings. 422 U.S. at 594; in each of the cases, the suspect answered questions put to him by the interrogator, 422 U.S. at 594; and, in each of the cases, the suspect made a second statement corroborative of the first. 422 U.S. at 595.[46] This Court noted that Brown's second statement was clearly the result and the fruit of his first statement (422 U.S. at 605 n.12), and stated:

> The fact that Brown had made one statement, believed by him to be admissible, and his cooperation with the arresting and interrogating officers . . . , with his anticipation of leniency, bolstered the pressures for him to give the second, *or at least vitiated any incentive on his part to avoid self incrimination.* [Citation omitted, emphasis added.] 422 U.S. at 605 n. 12. [Emphasis added.]

In summary, the prior decisions of this Court clearly show that where an initial inculpatory statement is involuntary, as here, any subsequent inculpatory statement must be excluded unless there was some significant "break in the stream of events . . . 'sufficient to institute' the [latter statement] from the effect of the [former]." *Darwin* v. *Connecticut, supra,* 391 U.S. at 349. This is so regardless of whether the second statement was made under the continuing influence of the coercion which produced the first, see *Leyra* v. *Denno, supra*; or whether the second statement was made under the assumption that "the cat

[46]In *Brown,* the second statement was apparently made about four and one-half hours after the first. 422 U.S. at 595-96.

was already out of the bag," and there was nothing left to lose, see *United States* v. *Bayer*, *supra*. Moreover, the burden is properly placed on the prosecution to show not only the absence of continued coercion at the time of the second statement, but also the lack of causation between two statements. *Darwin* v. *Connecticut*, *supra*, at 351 (Harlan, J., concurring in part and dissenting in part).

In the present case, there were simply no intervening events sufficient to insulate the second statement from the first. Apparently, all that happened in the three hours between the two statements was that the defendant remained in detention at the police station. Indeed, the condition of the defendant was, if anything, worse at the time of the second statement than at the time of the first. The three o'clock statement therefore must be excluded as a product of the first, and as a product of the same coercion.

CONCLUSION

The lower court decision is correct. The initial confession was properly excluded because it was coerced and involuntary, in the totality of the circumstances. The lower court applied the correct criteria to factual determinations that are either uncontroverted or clearly warranted from the record. The dungarees were properly suppressed as the fruit of a direct violation of the Self-Incrimination Clause, and, alternatively, if there is any change in the law in this regard, the pants should be admissible for purposes of impeachment, only. The second inculpatory admission was properly suppressed because it was inextricably connected with the first statement, which was coerced and clearly involuntary. The absence of intervening circumstances

sufficient to insulate the second statement from the first requires suppression of the second. The findings, rulings and order of the Massachusetts Supreme Judicial Court should be affirmed.

Respectfully Submitted,

DAVID A. MILLS, ESQUIRE
Mills & Teague
75 Federal Street
Boston, MA 02110
482-4501

WALTER HURLEY,
ESQUIRE[47]
22 Beacon Street
Boston, MA 02108
742-2420

---

[47]Counsel acknowledge, with gratitude, the assistance of Eric S. Brandt and James E. O'Connell, Jr. of the Northeastern University School of Law, at Boston.